NO. 97201-0

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SUPREME COURT OF THE STATE OF WASHINGTON

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JEOUNG LEE and SHERRI MCFARLAND, on their own and on behalf of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY PUBLIC HOSPITAL DISTRICT #2

Petitioner.

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# AMICUS CURIAE BRIEF OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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## IDENTITY AND INTERESTS OF AMICUS

Washington Employment Lawyers Association (WELA) consists of approximately 220 Washington lawyers and is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. Here, WELA addresses the intersection of statutory rights and collectively bargained public sector contractual rights and the precedent governing whether collective bargaining has waived substantive statutory rights or the right to a judicial forum for vindication of statutory rights.[1]

## SUMMARY OF ARGUMENT

In the decision below, the Court of Appeals held that plaintiffs' substantive statutory wage and hour claims were not waived by the collective bargaining agreement (CBA) between the plaintiffs' employer, Evergreen Hospital (Evergreen), and the plaintiffs' union, Washington State Nurses Association (WSNA). The Court of Appeals also held that the CBA did not preclude the plaintiffs' access to Washington Courts to vindicate their statutory claims. *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*,

[1] Dan Johnson is a member of the WELA Amicus Committee. Because he is also a partner of the firm Breskin Johnson & Townsend, he is recused from all participation in this case.

7 Wn. App. 2d 566, 434 P.3d 1071, 1075, *review granted*, 193 Wn.2d 1029, 447 P.3d 167 (2019).

While the Court of Appeals correctly resolved these two issues, the court's analysis conflated the analysis of these two separate issues and failed to take into account binding precedent of this Court, the Federal Arbitration Act, and analogous case law in NLRA jurisprudence. This omitted case law sets a much more stringent standard for waiver of substantive statutory rights and for waiver of access to the courts than that set forth by the decision on review.

Here, the Court should issue a decision that delineates those standards which require that a substantive statutory right can be waived by a CBA only in explicit, clear and unmistakable language and that access to a judicial forum for a statutory right can be waived by a CBA only when the CBA:

- Explicitly states that the particular statutory right at issue is arbitrable;
- Explicitly states that the judicial forum is waived and that arbitration is the sole and exclusive forum for the violations of the statute;
- the party seeking arbitration is authorized under the CBA to initiate arbitration;
- the arbitrator is empowered to utilize statutory standards to decide the statutory issue and to issue statutory remedies.

## ARGUMENT

### I. Absent An Expressly Stated Clear And Unmistakable Waiver, Neither Substantive Statutory Rights Nor Access To The Courts To Vindicate Statutory Rights Are Waived By Collective Bargaining.

#### A. Waiver of substantive statutory rights through collective bargaining is accomplished only by an explicitly stated waiver of the statutory right, which is not present here.

##### 1. The decision below.

Correctly noting that the "critical question is whether Lee's claims are statutory or contractual," the Court of Appeals first turned to the question of whether the applicable CBA contained a substantive waiver of the legal right at issue, the entitlement to meal and rest periods set forth in WAC 296-126-092. *Lee*, 7 Wn. App. 2d at 573. The court rejected Evergreen's contention that, through a bargained waiver authorized under RCW 49.12.187, Evergreen and WSNA had superseded the plaintiffs' statutory claims by entering into a CBA that substituted contractual rights for rights under the WAC regarding appropriate rest and meal periods.[2] Examining the applicable CBA language and the statute, the court determined that the CBA was consistent with the statutory requirements and that therefore

[2] RCW 49.12.187 states, in relevant part, "Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods."

there had been no collectively bargained waiver of the substantive right as explicated in WAC 296-126-092. *Lee*, 7 Wn. App. 2d at 573-76.

The court observed that the Section 7.7 of the CBA states that meal and rest breaks "shall be administered in accordance with state law;" and that the state law is found in WAC 296-126-092. *Id*., at 574 (citing CP at 93). The court noted that the CBA, by stating that breaks would be administered in accordance with state law, had made "the administration of the CBA necessarily rel[y] on compliance with the regulation rather than the CBA varying from or superseding the regulation." *Id*. at 575.

The Court found that although the CBA requires 15 minute rest breaks, whereas WAC 296-126-092(4) provides for a rest period of "no less than ten minutes," there was no inconsistency with the WAC. Fifteen minutes is not less than ten minutes and plaintiffs had not asserted claims for being denied 15 minute breaks; rather their claims were for entirely missed breaks. *Id.*, at 575-76. The court found the same consistency with regard to meal breaks. *Id*. Because the CBA adopted the rules set forth in the WAC, the court held that the CBA merely comported with, rather than superseded the statutory rights of plaintiffs. *Id*. at 574.

**2. The existence of inconsistency between statutory and contractually created rights does not alone suffice to waive a substantive statutory right.**

While the consistency between the statutory and contractual schemes as noted by the court leads to a strong inference that no waiver had been negotiated, the mere fact that inconsistency existed, had it existed, would not be sufficient under Washington precedent to establish that waiver had occurred. Inconsistency, or consistency for that matter, between similar contractual and statutory rights simply indicates that two separate rights exist, each enforceable in its own forum, absent additional explicit clear and unmistakable language indicating waiver of the substantive statutory right. *Alexander v. Gardner-Denver*, 415 U.S. 36, 49-50, 52, 53-54 (1974) (A "contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 262 (2009) (Recognizing the continuing validity of *Gardner-Denver's* holding that the statutory and contractual rights were distinct "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by" the statute.); *Mathews v.*

*Denver Newspaper Agency LLP*, 649 F.3d 1199, 1206 (10th Cir. 2011) (same).[3]

Thus, additional exploration of the CBA language is necessary to determine whether the rights set forth in there accomplish a waiver of the substantive rest and meal breaks required by WAC 296-126-092.

### 3. To effectively waive a substantive legal right, the waiver must be explicitly stated in clear and unmistakable terms. Here no such explicit waiver exists.

Binding precedent of the Federal Arbitration Act and this Court's jurisprudence set the standard for determining whether waiver has occurred. In *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 462, 938 P.2d 827, 834 (1997), this Court held that Washington courts will not "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is **'explicitly stated.'** More succinctly, the waiver must be **clear and unmistakable**." *Id*., (quoting *Metropolitan Edison* 460 U.S. at 708) (emphasis added).[4]

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[3] The procedural posture and the substantive decision in *14 Penn Plaza* make clear that the arbitration jurisprudence developed under the NLRA and FAA are consistent. 556 U.S. 247, 254, 129 S. Ct. at 1462, 1465.

[4] *Pasco* involved a claim that CBA provisions had waived the union's member's substantive statutory collective bargaining rights, which the court analyzed by reference to analogous jurisprudence under the National Labor Relations Act (NLRA). *Pasco*, 132 Wn.2d at 462 (citing *Metropolitan Edison*, 460 U.S. at 708). Washington courts apply

The Court of Appeals below did not cite *Pasco* or the "explicitly stated" standard. And, while it did cite the "clear and unmistakable" standard for waiver of substantive rights, it did so only in its discussion of whether the CBA language waived the plaintiffs' access to a judicial forum to enforce their statutory rights, not in its discussion of whether the substantive legal right had been waived in the first instance.

The CBA at issue here does not explicitly state that the plaintiffs' rest and meal break rights under WAC 296-126-092 are waived in favor of a purely contractual right; and as such there is no "clear and unmistakable" waiver of those statutory rights. This is so, regardless of any inconsistency between the statutory and contractual rights.

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NLRA jurisprudence to determine arbitrability questions arising in the public sector context. *See, e.g*., *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 723, 81 P.3d 111, 113–14 (2003) (The principles governing arbitration of public sector labor disputes arising under a collective bargaining agreement are set forth by the United States Supreme Court in the "Steelworkers Trilogy.") (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula,* 130 Wn.2d 401, 413, 924 P.2d 13 (1996); *Gen. Teamsters Local No. 231 v. Whatcom County*, 38 Wn. App. 715, 716, 687 P.2d 1154 (1984)).

**B. Access to a judicial forum for statutory rights may be waived by collective bargaining only by the existence of all of the following: express inclusion of a statutory right (as opposed to an identical contractual right), express waiver of the right to a judicial forum for the statutory right, and express empowerment of the arbitrator to decide the statutory issue and comply with statutory standards. None of those requirements are met here.**

Although the Court of Appeals discussion of the second prong—language encompassing the statutory claim into the arbitration obligation—was correct in so far as it went, the court failed to address binding precedent that reinforces its conclusion. As the Court of Appeals recognized, "a union may lawfully waive certain statutory rights of represented employees in a collective bargaining agreement." *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 409, 842 P.2d 938, 946 (1992) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705, (1983).[5] However, to accomplish a waiver of access to the courts, there must be indisputably clear language establishing the exclusion from that forum and establishing that the arbitrator is fully

[5] In *Shoreline*, this Court held that neither a public sector employee, nor her union through collective bargaining, may waive a substantive statutory right if that waiver offends public policy. Unlike in *Shoreline*, here the question is whether the legislated ability to waive the substantive right was exercised. Nor does the issue presented involve federal preemption principles applicable only in the private sector where under the National Labor Relations Act, Section 301, 29 U.S.C. § 185(a) or the Railway Labor Act, the need to interpret a CBA would preempt all but non-negotiable minimum state standards. *See, e.g., Hume v. Am. Disposal Co.*, 124 Wn. 2d 656, 662, 880 P.2d 988, 992 (1994); *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 919 (9th Cir. 2018).

empowered to decide legal rights according to legal, not law of the shop, standards.

### 1. Identical or similar contractual and statutory rights co-exist and are independently enforceable in their own fora.

The Court of Appeals cited *Wright v. Universal Mar. Serv. Corp*., 525 U.S. 70, 78-80, (1998), for its holding that "[e]ven where a CBA contains a provision that is coextensive with a statutory right, the ultimate question is what the law requires; 'and that is not a question which should be presumed to be included within the arbitration requirement.'" *Lee*, 434 P.3d at 1077.

However, the Court of Appeals failed to address the line of cases which hold that the CBA's purely contractual right may be identical to the statutory right, and in fact be defined with reference to the statute, or as here, to the regulation implementing the statute, without waiver of the judicial forum. *See e.g.*, *Ibarra v. United Parcel Serv.*, 695 F.3d 354, 358–59 (5th Cir. 2012) ("[A]n employee's statutory and contractual rights remain independent even if "the contours of the CBA's antidiscrimination protections [are] defined by reference to federal law."); *Mathews*, 649 F.3d at 1206 (Although the CBA provided contractual guarantees against discrimination precisely coterminous with those given in federal law, those were parallel contractual and statutory rights and did not waive the

employee's right to a judicial forum.) Here, as discussed above, reference to regulatory standards that govern the contractual right is not sufficient to waive access to court for vindication of the parallel statutory right.

**2. Where the CBA does not expressly state that the statutory right at issue is arbitrable, there is no waiver of the judicial forum.**

The Court of Appeals noted that, in *14 Penn Plaza*, 556 U.S. at 258-59, 264, the Supreme Court held that a CBA waives a judicial forum only where the CBA's "arbitration provision *expressly* covers *both* statutory and contractual discrimination claims" and "explicitly state[s]" in "clear and unmistakable language" that the ability to enforce statutory rights in court has been waived.[6] Yet, the Court of Appeals failed to follow that declaration with an examination of Section 16.1 of CBA, which defines a grievance as an "alleged breach of the express terms and conditions of this agreement," and thus restricts grievances to purely contractual matters. CP 106.

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[6] The decision in *Brundridge v. Fluor Fed. Servs. Inc*., 109 Wn. App. 347, 35 P.3d 389 (2001), while utilizing the "clear and unmistakable" standard in an analogous private sector case, did not apply the stringent standard laid out here, because it was without the benefit of the decision in *14 Penn Plaza*, which was decided in 2009. The decision in *Cox v. Kroger Co.*, Wn.App.2d 395, 4040 409 P.3d 1191 (2018) also does not apply the complete test laid out in *14 Penn Plaza* and subsequent cases, and conflates the analysis of the alleged waiver of the substantive right with the alleged waiver of the judicial forum. The decision in *Hill v. Garda CL Nw. Inc.*, 169 Wn. App. 685, 696, 281 P.3d 334, 340 (2012), *rev'd, on other grounds* 179 Wn.2d 47, 308 P.3d 635 (2013) is similarly flawed by its failure to apply the complete and stringent test of *14 Penn Plaza*.

This contractual language reinforces the determination that the CBA, by referencing the WAC, defines only a contractual right and that the reference is not made in order to waive a judicial forum for vindication of the statutory right. *See e.g.*, *O'Brien v. Town of Agawam*, 350 F.3d 279, 285–86 (1st Cir. 2003) (no waiver of judicial forum where CBA defines grievances subject to arbitration as alleged violations of the CBA); *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 52–53 (1st Cir. 2013) (same). As the Tenth Circuit explained, "where the arbitration agreement between the parties empowers the arbitrator 'to resolve only questions of contractual rights' under a collective-bargaining agreement, such arbitrator's decision could not preclude the employee from later bringing his [statutory claim] in … court 'regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.'" *Mathews*, 649 F.3d at 1204 (citing *Pyett*, 129 S.Ct. at 1467).

**3. Where there is no express provision excluding the judicial forum, there is no waiver of that forum.**

Citing *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1131 (7th Cir. 2017), the Court of Appeals also observed that, for the judicial forum to be waived, the statutory right must be explicitly stated in the CBA as an arbitrable right. However, the court then failed to examine the language in Section 16.1 at Step 4, to determine if that were the case.

That section clearly confines the arbitrator's authority to contractual claims: "The arbitrator shall have no authority to add to, subtract from, or otherwise change or modify the provisions of this Agreement, but shall be authorized only to interpret existing provisions of this Agreement as they may apply to the specific facts of the issue in dispute." CP 107.

And significantly, the Court of Appeals failed to require, as *Vega* did, relying on U.S., Supreme Court precedent, that the CBA also make '[a]ll such claims … subject to the grievance and arbitration procedure ... **as the sole and exclusive remedy for violations**." *Vega*, 856 F.3d 1130, 1135 (quoting *Pyett*, 556 U.S. at 258–59) (emphasis added). Here, in addition to not expressly covering statutory claims, the CBA does not make arbitration the sole and exclusive remedy. CP 106-107.

**4. Under the CBA neither Evergreen nor the plaintiffs are empowered to invoke arbitration.**

Nor is the arbitrator, who is selected solely by the WSNA and Evergreen, empowered to decide any disputes not forwarded by the WSNA. CP 107 (Step 4. Arbitration). The CBA's failure to contain any arbitration procedures governing the arbitration of the statutory claims against Evergreen demonstrates that the CBA does not waive the plaintiffs' rights to access Washington Courts to vindicate those rights. *See Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9th Cir. 2011)

(Holding that there was no waiver of judicial forum where CBA provided no mechanism that would allow employees to initiate the arbitration process or to participate in the selection of the arbitrator). *Cf.*, *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 56, 308 P.3d 635, 639 (2013) (agreement's fee-sharing provision is unconscionable because it effectively prohibits employees from bringing claims in the arbitral forum.)

The instant dispute is between Evergreen and the plaintiffs; the WSNA is not a party. Indeed, under the CBA, Evergreen is not entitled to initiate the arbitration process, again a disability fatal to its argument that the statutory claims at issue here are subject to arbitration at its behest. *See* CP 107 (Step 4).

**5. There is no waiver of a judicial forum where the arbitrator is not empowered to decide statutory matters, to follow statutory standards and issue statutory remedies, and here the arbitrator is not so empowered.**

In *14 Penn Plaza*, the Supreme Court made clear that, while a union could prospectively waive a bargaining unit member's right to a judicial forum, it could not prospectively waive a member's substantive rights. 556 U.S. 247, 265-66 ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*,

*Inc.*, 473 U.S. 614, 628)). Unlike the CBA language in *14 Penn Plaza*, 556 U.S. at 252, which provided that "Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination," here the CBA fails to incorporate substantive legal standards, CP 107, leaving the arbitrator to the "law of the shop" which traditionally includes sharing of arbitration costs, short time limits for initiating grievances, and "make whole remedies" of reinstatement and back pay, but do not include statutory damages for willful withholding, or attorney's fees, which the claims at issue here carry as remedies. Compare HOW ARBITRATION WORKS, ELKOURI AND ELKOURI, 18.3.A (8th ED. 2018) with RCW 49.52.050 and 070, and RCW 49.48.030. Indeed, the arbitration provision requires the parties to share the costs of arbitration and expressly prohibits fee awards. See CP 107 ("Each party shall bear one-half (1/2) of the fee of the Arbitrator and any other expense jointly incurred by mutual consent incident to the arbitration hearing. All other expenses shall be borne by the party incurring them, and neither party shall be responsible for the expenses of witnesses called by the other party.") Another CBA provision requires that the grievance initiating the grievance arbitration process be filed within 14 days of the occurrence giving rise to the claim in plain conflict with the applicable statute of limitations for the statutory claims. *See* CP 106, Step 1.

Therefore, even if the other prerequisites to waiver of a judicial forum were met, that waiver could not be enforced because a contract that does not empower the arbitrator to require statutory standards or award statutory remedies does not meet the *14 Penn Plaza* standard that employees "'not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'". 556 U.S. 247, 265-66.[7]

### C. The Evergreen-WSNA CBA does not contain language superseding the WAC and does not contain language sufficient to demonstrate a clear and unmistakable waiver of the judicial forum for vindication of plaintiffs' rights under RCW 49.12.

In summary: The CBA here simply creates a contractual right that is identical to the legal right of plaintiffs, who retain both rights. *Gardner-Denver,* 415 U.S. at 49-50. Only if the CBA waived the WAC requirements; the statutory rights under the WAC were explicitly stated to be arbitrable; the employees themselves could initiate arbitration; the arbitrator was empowered to utilize statutory procedures, decide the statutory issue and issue statutory remedies; and there was an explicit

[7] Additionally a CBA that omits these statutory procedures and rights is unconscionable under Washington law. *Garda,* 179 Wn.2d at 56. It is important to note, that this Court's decision in *Garda,* addressed the question of unconscionability, and did not address the lower court's ruling that the CBA had waived the plaintiff's access to a judicial forum, *Id*., 179 at 53, which as discussed in footnote 6, *supra,* was wrongly decided.

statement that arbitration was the sole and exclusive forum for violations of the WAC, would the stringent standards be met to establish an explicit clear and unmistakable waiver of the judicial forum. *14 Penn Plaza*, 556 U.S. at 258–59; *Vega*, 856 F.3d 1130, 1135. Those standards were not met here.

## CONCLUSION

The precedents under the Federal Arbitration Act and Washington state law discussed above set forth the stringent tests for waiver of statutory rights, and directly bear on the outcome here: the CBA did not waive the substantive rights of the plaintiffs under WAC 296-126-092 and did not waive their access to Washington Courts for redress.

This Court should affirm that decision below in an opinion that delineates the much more rigorous standards for holding that a CBA waived a substantive statutory right or a judicial forum and clarifying that state precedent in this regard is consistent with Federal Arbitration Act and Washington jurisprudence.

Respectfully submitted this 6th day of January, 2020.

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